

FEDERAL MARITIME COMMISSION

46 CFR PARTS 550 AND 580

[DOCKET NO. 85-19]

TARIFF PUBLICATION OF FREE TIME AND DETENTION
CHARGES APPLICABLE TO CARRIER EQUIPMENT INTERCHANGED
WITH SHIPPERS OR THEIR AGENTS

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Commission amends its domestic offshore and foreign tariff filing rules to require common carriers to publish in their tariffs the terms and conditions (including free time allowed and detention or similar charges assessed) governing the use of carrier-provided equipment (including cargo containers, trailers and chassis) by shippers or persons acting on the shippers' behalf. Under the rule, if the terms and conditions are fully set forth in an interchange agreement with shippers or their agents, the carrier must publish a specimen copy of the agreement in its tariff. The rule also provides for an exemption from the filing and publication requirements for those interchange agreements that do not affect the terms and conditions governing the use of carrier-provided equipment as stated in the carrier's tariff.

DATE: [Insert date 30 days after date of publication in the Federal Register].

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SUPPLEMENTARY INFORMATION:

This proceeding was instituted by a Notice of Proposed Rulemaking ("Notice") published in the Federal Register (50 FR 32097) in response to a Petition for Rulemaking ("Petition") filed by American President Lines ("APL"). In the Notice, the Commission proposed amendments to 46 CFR 550.5, 580.5 and 580.7 that would require carriers to specify in their tariffs and service contracts the terms and conditions governing the use of carrier-provided equipment by shippers or their agents.¹ The Notice stated that because the terms and conditions for the use of carrier-provided equipment, whether provided directly to the shipper or to inland carriers acting as shippers' agents, affect the ultimate rate paid by the shipper, those terms and conditions appear to fall within the tariff and service contract filing requirements of section 8 of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1707, and section 2 of the Intercoastal Shipping Act, 1933 ("1933 Act"), 46 U.S.C. app. 844.

Comments filed in response to the Notice advanced conflicting legal and policy arguments concerning the propriety of the proposed amendments. Specifically, disagreement was voiced over the proposed requirement that

¹ The Petition alleged that many carrier tariffs allowed the individual negotiation of free time and detention agreements for carrier-provided equipment. The practice of ad hoc negotiation was said to be prevalent in those situations where inland carriers received or tendered cargo on behalf of shippers.

negotiated equipment interchange agreements ("EIA's") between ocean common carriers, subject to Commission jurisdiction, be disclosed in ocean common carrier tariffs. Not satisfied that an adequate record had been developed to resolve the legal and policy issues raised, the Commission issued an Amended Notice of Proposed Rulemaking ("Amended Notice"), referring the matter to an Administrative Law Judge to conduct a formal hearing and issue an Initial Decision ("I.D.") recommending a disposition based upon the record developed.

The Amended Notice specified the following issues: (1) whether the 1984 Act, the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. app. 801, and the 1933 Act require the filing and publication in tariffs of equipment interchange agreements between ocean common carriers and shippers and between ocean common carriers and inland carriers; and (2) if so, whether there exist sufficient policy reasons to exempt such agreements from the Commission's tariff filing requirements pursuant to section 16 of the 1984 Act, 46 U.S.C. app. 1715, and section 35 of the 1916 Act, 46 U.S.C. app. 833a.

All entities that had filed comments in response to the original Notice were made parties to the proceeding. The Commission's Bureau of Hearing Counsel was also made a party to the proceeding. In addition to the comments filed by the parties in response to the original Notice, further written submissions and responses were filed pursuant to a procedural schedule ordered by presiding Administrative Law

Judge Joseph N. Ingolia ("Presiding Officer"). Hearings were held and oral testimony heard, after which briefs were filed.

The Presiding Officer issued a lengthy I.D. finding that the proposed requirements for the inclusion of carrier-provided equipment free time and detention practices in tariffs on file with the Commission were proper as a matter of law and policy. He recommended against any exemption for EIA's. Exceptions to the I.D. and Replies to Exceptions were filed by APL and the Inter-American Freight Conference ("IAFC"). Sea-Land Services, Inc. ("Sea-Land") filed a Reply to Exceptions.

INITIAL DECISION

The Presiding Officer held that the Commission has jurisdiction over the practices of ocean common carriers relevant to the terms and conditions of providing equipment to shippers as part of the common carriers' transportation services. The Commission was also found to have jurisdiction to require the filing and/or publication of EIA's with inland carriers when those agreements affect the rates, charges and practices applied to shippers/consignees.

The Presiding Officer took official notice of free time and detention rules in thirteen conference tariffs. All of these tariffs allow exceptions to the tariff rules for EIA's. The majority of those exceptions provide that the tariffs' free time and detention charges do not apply while

the carriers' equipment is under an EIA with an inland carrier. One exception applies at foreign ports and two tariffs require the execution of a "standard" interchange agreement. The practice of ocean carriers entering into EIA's with inland carriers was found to be widespread. The Presiding Officer explained that the specific terms of EIA's are subject to negotiation and often vary widely, depending upon economic factors.

The Presiding Officer recommended that, in order to adequately inform the shipping public of carrier practices that affect shipping terms, the Commission's tariff rules be amended to define "free time and demurrage" and "free time and detention." It was suggested that proposed regulations specify that the terms and conditions of providing the carriers' equipment to shippers/consignees may not be varied by entering into agreements with third parties respecting the same "free time and detention."

The Presiding Officer concluded that no exemption for the filing and publication of EIA's is warranted. However, he suggested that an exemption might be warranted if the carriers' tariffs state that free time and detention rules are not subject to change by EIA's.

Finally, the Presiding Officer agreed with the findings in the Notice that the proposed amendments are not a "major" rule under Executive Order No. 12291, are properly exempted from the Regulatory Flexibility Act, and do not impose excessive burdens as defined by the Paperwork Reduction Act.

He noted that alleged errors in the Notice findings were not supported by any sufficient legal or factual matter.

DISCUSSION

The I.D. presents a detailed and comprehensive analysis of the relevant issues in this proceeding and is generally well-reasoned and supported, both as a matter of law and fact. Many of the Exceptions to the I.D. are rearguments of matters raised below that were fully addressed in the I.D. The Commission will not attempt to repeat the analysis of the Presiding Officer beyond that necessary to dispose of these Exceptions. Therefore, for reasons stated below and except as otherwise indicated, the I.D. is adopted by the Commission.

The critical and fundamental issue presented in the Amended Notice is whether an EIA between an ocean common carrier and an inland carrier is a "practice" relating to a "facility under the control of the carrier . . . that in any way change, affect or determine any part or the aggregate of the rates or charges" paid by the shipper within the meaning

of section 8(a)(1)(D) of the 1984 Act² and section 2 of the 1933 Act. The Presiding Officer correctly found that an EIA is just such a "practice."

IAFC disagrees and again argues on Exceptions that, with the exception of the arrangement between a carrier and a freight forwarder, no arrangement between a carrier and any party other than the shipper need be disclosed in the carrier's tariff. IAFC takes the position that the I.D. did not establish a linkage between an EIA and the amount charged to a shipper or consignee by an ocean or inland carrier, and that, therefore, the cost of these inland transportation charges need not be disclosed in a carrier's tariff.

The record developed by the Presiding Officer establishes that EIA's affect the charges paid by shippers. As was noted in the I.D., many common carrier tariffs on

² The Notice also proposed to amend 46 CFR 580.7(g)(2)(iv) to require the inclusion of free time and detention charges in the "line-haul rate" essential element of service contracts. See, section 8(c)(4) of the 1984 Act. However, during the course of this proceeding the Commission amended its service contract regulations in Docket No. 86-6 - Service Contracts, and adopted language almost identical to section 8(a)(1)(D). See 46 CFR 581.5(a)(3)(iii). Accordingly, the Commission's interpretation of section 8(a)(1)(D) of the 1984 Act in this proceeding will also apply to the appropriate provisions of the Commission's service contract regulations. This is also consistent with the legislative history relevant to service contracts under the 1984 Act. That history indicates that with regard to ancillary services and charges, any deviation from the carrier's tariff must be identified in the "line-haul rate" disclosure. See, S. Rep. No. 3, 98th Cong., 1st Sess. 31-32 (1983). In light of the foregoing, the Commission does not deem it necessary to amend its existing service contract regulations to specifically include EIA's.

file with the Commission on their face establish a sufficient basis for the proposed regulations. The tariffs specifically provide that stated free time and detention charges for carrier-provided container equipment will differ when such equipment is provided pursuant to an EIA.³

Because EIA's affect the terms and conditions of transportation provided by the shipper, the Shipping Acts require them to be published in the ocean common carrier's tariff. Accordingly, to the extent they affect shippers, EIA's are subject to the tariff filing requirements of the 1984 Act and the 1933 Act regardless of whether they are primarily agreements with non-shipper third parties.⁴

IAFC also reasserts its argument that the practices of inland carriers that are not the agents of shippers are subject to the jurisdiction of the Interstate Commerce Commission ("ICC"). IAFC concludes that because EIA's cannot be enforced by the Commission, they should not be filed. In reply, APL submits that a finding of an agency relationship with a shipper is not needed so long as the inland carrier is acting on behalf of a shipper. However,

³ The Presiding Officer took official notice of 13 tariffs on file with the Commission that exempted containers subject to EIA's from otherwise applicable free time and detention rules. (I.D. at 10).

⁴ Cf., Council of North Atlantic Shipping Associations v. F.M.C., 672 F.2d 171, 172 (D.C. Cir.), cert. denied, 459 U.S. 830 (1982); United States v. Sea-Land Service, Inc., 424 F.Supp. 1008, 1011, 1012 (D.N.J. 1977), appeal dismissed mem., 577 F.2d 730 (3rd Cir. 1978), cert. denied, 439 U.S. 1072 (1979).

to clarify the relationship between the inland carrier and the shipper, APL suggests that the term "or persons acting on behalf of shippers" be substituted for "their agents" in any final rule promulgated in this proceeding.

The Presiding Officer properly held that it does not matter if the inland carrier is technically an "agent" of the shipper or an independent third-party to the transportation arrangement or whether the inland carrier is subject to ICC regulation. The Commission is not asserting jurisdiction over inland carriers or any other third party. The rule proposed in this proceeding is limited to the practices of common carriers subject to Commission jurisdiction.⁵ The use of the term "agent" in the proposed rule was intended to apply to situations where carrier-provided equipment is tendered to a third party under an EIA but ultimately is used by a shipper whose freight charges are affected by the terms of the EIA. Accordingly, APL's suggestion that the rule be revised to include within its scope an EIA executed by a person "acting on behalf of a shipper" regardless of whether that person is technically a shipper's agent has merit and will be adopted.

After concluding that EIA's are required to be published as tariff matter, the Presiding Officer proceeded to find that if a carrier's tariff includes terms and conditions applicable to a shipper's use of the carrier's

⁵ See, Alabama Great Southern R.R. Co. v. F.M.C., 379 F.2d 100 (D.C. Cir. 1967).

equipment, the carrier may not contract with inland carriers in derogation of those tariff rules. He reasoned that "the ocean carrier cannot purport to rent its equipment to an inland carrier under an EIA or other agreement when in fact that equipment is already part of an agreement between the ocean carrier and the shipper/consignee." (I.D. at 65). Accordingly, he suggested "demurrage" and "detention" definitions that would preclude conflicting equipment rental arrangements and make it unnecessary to file EIA's.

While otherwise supporting the findings and conclusions of the I.D., APL objects to the "demurrage" and "detention" definitions. APL argues that the scope of this proceeding is limited to whether a publication requirement should be imposed and was not intended to include the possible imposition of substantive regulatory requirements. We concur.

The definitions with substantive requirements suggested by the Presiding Officer do go beyond the scope of this proceeding as delineated by the Notice and Amended Notice. While the definitions may be valid, this rulemaking addressed the filing of EIA's and not the contents of the EIA's themselves. Therefore, the regulations proposed in the I.D. that go beyond filing and publication requirements

will not be adopted in this proceeding.⁶

The other major issue specified in the Amended Notice is whether EIA's should be exempted from otherwise applicable statutory requirements. IAFC argues that an exemption for EIA's is justified because effective regulation of EIA's would require the filing and publication of massive amounts of information, thereby imposing excessive burdens on the shipping industry and undue governmental interference in commercial transactions. Moreover, the proposed rule is said to be contrary to the underlying purposes of the 1984 Act and other laws declarative of a public policy of minimizing government regulation and burdens on commercial business sectors.⁷ We are not persuaded by these challenges.

The Commission agrees with the Presiding Officer that IAFC's allegation of burdensomeness appears to be based upon conclusory arguments unsupported by statistical studies or

⁶ IAFC takes issue with the I.D.'s suggestion that EIA's with inland carriers should be prohibited with respect to containers specified for a given shipper. Because the substantive requirements suggested by the Presiding Officer will not be adopted, this challenge is mooted and need not be addressed.

⁷ The contentions of the North European Conferences advanced before the Presiding Officer that the proposed rule was inconsistent with section 2 of the 1984 Act, the Regulatory Flexibility Act, 5 U.S.C. 601-612, the Paperwork Reduction Act, 44 U.S.C. 3501-3520, and Executive Order No. 12291, appear to have been abandoned on appeal. Neither the Conferences nor any other party have taken exception to the finding in the I.D. that these authorities were not violated.

similar types of substantial evidence.⁸ Moreover, general statutory policies of minimizing government regulation should not override the specific statutory requirements stated in sections 8 and 10 of the 1984 Act.⁹

Finally, IAFC argues that exempting EIA's would not "substantially impair effective regulation" or be "unjustly discriminatory" within the meaning of section 16 of the 1984 Act. Although acknowledging that EIA's could be used to confer an advantage or disadvantage on a particular shipper, IAFC maintains that discriminatory use of EIA's is a matter for Commission enforcement activities and should not be addressed by new regulations. We disagree.

Exempting EIA's would not only appear to substantially impair effective regulation but could also result in unjust discrimination. The evidence of actual industry practices reveals that EIA's are negotiated on an individual basis resulting in widely varying terms and conditions affecting shippers.¹⁰ Under these circumstances, the potential for discriminatory treatment between such shippers is high. We therefore concur with the Presiding Officer that public

⁸ See, Original Joint Submission of North European Conferences, Affidavit of Mr. Harvey M. Flitter at 31-32; I.D. at 68-70. On Exceptions, IAFC cited no evidence in support of its allegations of burdensomeness.

⁹ See, Association of American Railroads v. Costle, 562 F.2d 1310, 1316 (D.C. Cir. 1977).

¹⁰ See, Original Joint Submission of North European Conferences, Affidavit of Mr. Harvey M. Flitter at 15-18; I.D. at 24, 71.

disclosure of these terms and conditions is so basic to the Commission's regulatory responsibilities that it overrides any arguments advanced by proponents of an exemption. For that reason, the Commission cannot make the findings required to support an exemption under section 16.

In summary, the Presiding Officer's conclusion that EIA's should not be exempted from filing and publication requirements is supported by the record. Proponents of an exemption have failed to put forth convincing evidence that would justify an exemption or satisfy the minimum requirements of the statutory exemption provisions.¹¹ Accordingly, the Commission affirms and adopts the Presiding Officer's finding that an exemption should not be granted in this proceeding except that, to the extent the carriers' tariffs specify that EIA's may not affect the charges to shippers, they need not be filed.

List of subjects in 46 CFR Parts 550 and 580:

Maritime carriers; Rates and fares; Reporting and recordkeeping requirements.

Therefore, pursuant to 5 U.S.C. 553; secs. 8, 9, 10, and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1707, 1708, 1709, and 1716); secs. 18(a) and 43 of the Shipping Act, 1916 (46 U.S.C. app. 817(a) and 841a; and sec. 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. 844), the Federal Maritime Commission amends Parts 550 and 580 of

¹¹See, section 16 of the 1984 Act, section 35 of the 1916 Act; see also, Amended Notice at 3, n.3.

Title 46 of the Code of Federal Regulations as follows:

1. The authority citation for Part 550 is revised to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 812, 814, 815 817(a), 820, 833a, 841, 843, 844, 845a and 847.

2. In section 550.1 add a new paragraph (h) to read as follows:

Section 550.1 Exemptions

* * * * *

(h) Equipment-Interchange Agreements between common carriers subject to this part and inland carriers, where such agreements are not referred to in the carriers' tariffs and do not affect the tariff rates, charges or practices of the carriers.

3. In section 550.5 add a new paragraph (b)(8)(xvii) as follows:

Section 550.5 Contents of tariffs.

* * * * *

(b) * * *

(8) * * *

(xvii) Use of carrier equipment. Tariffs shall state the terms and conditions (including free time allowed and detention or similar charges assessed) governing the use of carrier-provided equipment (including cargo containers, trailers, and chassis) by shippers. If such terms and conditions are fully set forth in an equipment interchange

agreement, either in whole or in part, that the carrier requires be executed by such shippers or persons acting on behalf of such shippers, a copy of such agreement shall be filed in accordance with paragraph (b)(8)(vii) of this section.

* * * * *

4. In section 550.5 change the reference in the first sentence of paragraph (b)(9) to number 18.

5. The authority citation for Part 580 continues to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702-1705, 1707, 1709, 1712, 1714-1716 and 1718.

6. In section 580.1, add a new paragraph (c)(8) to read as follows:

Section 580.1 Exemptions and exclusions.

* * * * *

(c) * * *

(8) Equipment-Interchange Agreements between common carriers subject to this part and inland carriers, where such agreements are not referred to in the carriers' tariffs and do not affect the tariff rates, charges or practices of the carriers.

7. In section 580.5 add a new paragraph (d)(21) to read as follows:

Section 580.5 Tariff contents.

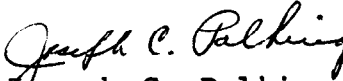
* * * * *

(d) * * *

(21) Use of carrier equipment. Tariffs shall state the terms and conditions (including free time allowed and detention or similar charges assessed) governing the use of carrier-provided equipment (including cargo containers, trailers, and chassis) by shippers. If such terms and conditions are fully set forth in an equipment interchange agreement, either in whole or in part, that the carrier requires be executed by such shippers or persons acting on behalf of such shippers, a copy of such agreement shall be filed in accordance with paragraph (d)(8) of this section.

* * * * *

By the Commission


Joseph C. Polking
Secretary

(S E R V E D)
(March 21, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PARTS 550 and 580

[DOCKET NO. 85-19]

TARIFF PUBLICATION OF FREE TIME AND DETENTION CHARGES
APPLICABLE TO CARRIER EQUIPMENT INTERCHANGED WITH SHIPPERS
OR THEIR AGENTS

AGENCY: Federal Maritime Commission.

ACTION: Final rule; extension of effective date.

SUMMARY: In response to requests from affected conferences, the Federal Maritime Commission has determined to extend the effective date of the final rule in Docket No. 85-19.

DATE: Effective June 26, 1988

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

The Commission served a final rule in this proceeding on February 18, 1988, with an effective date 30 days after publication in the Federal Register. The notice appeared on February 26, 1988 (53 FR 5770) with an effective date of March 28, 1988.

Various conferences have filed requests for a 90-day stay of the effective date. The conferences stress the magnitude of complying with the new filing requirements imposed by the rule and indicate that the current 30-day period is insufficient to achieve compliance.

Upon consideration of the requests, the Commission has determined to grant a 90-day extension of the effective date of the final rule in Docket No. 85-19. The date the rule will become effective is established as June 26, 1988.

By the Commission.



Tony P. Kominoth
Assistant Secretary

(S E R V E D)
(August 25, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PARTS 550 AND 580

[DOCKET NO. 85-19]

TARIFF PUBLICATION OF FREE TIME AND DETENTION CHARGES
APPLICABLE TO CARRIER EQUIPMENT INTERCHANGED WITH SHIPPERS
OR THEIR AGENTS

AGENCY: Federal Maritime Commission

ACTION: Final rule; stay of effective date.

SUMMARY: Because of numerous inquiries from carriers and conferences concerning various aspects of the Equipment Interchange Agreement (EIA) filing requirements, the Federal Maritime Commission has determined to provide an indefinite stay of the effective date of the Final Rule in Docket No. 85-19.

DATE: Effective upon publication.

FOR FURTHER INFORMATION CONTACT:

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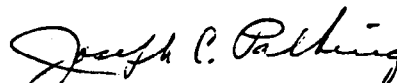
SUPPLEMENTARY INFORMATION:

The Commission published the Final Rule in this proceeding in the Federal Register on February 26, 1988 (53 FR 5770) with an effective date of March 28, 1988. On March 9, 1988, a petition was filed by several conferences requesting a 90-day stay of the effective date. The purpose of the request was to allow carriers

and conferences sufficient time to comply with the new rule. On March 21, 1988, (53 FR 9629, March 24, 1988) the Commission granted that request, extending the effective date of the Final Rule to June 26, 1988.

On June 17, 1988, (53 FR 23632, June 23, 1988) because of the continuing compliance difficulties faced by the industry, the Commission granted a further 90-day extension of the Rule's effective date until September 30, 1988. With a number of issues yet to be resolved regarding compliance with the various aspects of the Equipment Interchange Agreements filing requirements, the Commission has determined to grant an indefinite stay of the effective date of Docket No. 85-19. This stay will provide the Commission with an opportunity to address these issues either formally or informally and develop guidelines to assure compliance with the rule in a manner which both satisfies its intent and is not overly burdensome on the industry or the Commission.

By the Commission,


Joseph C. Polking
Secretary